NO. 83677-9

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

CITY OF SEATTLE

Respondent,

v.

ROBERT MAY,

Petitioner,

PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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I. Imtroduction

In *State v. Miller*, this court held, "[t]he trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence." State v. Miller. 156 Wn.2d 23, 24, 123 P.3d 827 (2005). Leading up to *Miller*, Washington courts had precluded criminal prosecutions for violations of invalid protection orders. Domestic violence protection orders are creatures of statute. The courts have no inherent authority to issue such orders. Thus, where the issuing court has failed to comply with the governing statute or the order is vague or otherwise inapplicable, the order should not serve as a predicate for criminal prosecution. May's challenge to the protection order in this case falls squarely within those permitted by *Miller* and not an impermissible collateral attack. The City's arguments to the contrary are unsupported by authority.

In addition, the City urges this court to overrule or restrict the unanimous decision in *Miller* and the line of cases preceding that decision. The City argues most any challenge to the validity of such an order is an impermissible collateral attack. The Court of Appeals properly rejected the City's argument as inconsistent with *Miller* and this court should as well. *See* Seattle v. May, 151 Wn.App. 694, 698 note 9, 213 P.3d 945 (2009). In

fact, this court already has. The City posits the same argument and case law the State argued to this court in *Miller*. The court rejected the arguments then and should reject them now.

The *Miller* rule regarding the applicability of protection orders promotes fundamental fairness in criminal prosecutions for violation of domestic violence protection orders and does not undermine the courts' ability to enforce such orders. The City has failed to present any evidence that *Miller* is wrong and harmful. State v. Stalker, 152 Wn.App. 805, 811, 219 P.3d 722 (2009). The court should grant May's motion to strike and decline to address this issue. In the alternative, the court should affirm the well-reasoned rule in *Miller*.

II. May's challenge is not an impermissible collateral attack. The fatal flaw in the predicate protection order here falls squarely within the scope of challenges authorized by *Miller*.

RCW 26.50 authorizes courts to exceed the one year limit for protection orders –where respondent is restrained from contact with his or her minor child-- only when the court makes the threshold finding required by RCW 26.50.060(2). The superior court issuing the protection order in this case failed to make such a finding and, thus, had no authority to make the order permanent. This challenge to the applicability of the order falls

squarely within the scope of those authorized by *Miller*. Seattle v. May, 151 Wn.App. 694, 698 note 9, 213 P.3d 945 (2009).[1]

In its supplemental brief, the City offers no argument to the contrary. Supplemental Brief of Respondent at 8-12. The City's arguments below were rejected by the Court of Appeals. May, 151 Wn.App. at 698, Note 8. This court should reject them as well.

In the Court of Appeals, the City posited three arguments, none of which are supported by the law or the facts. First, the City asserted that May did not "provide any fact specific argument that the correct findings were not made, other than their claim that the findings were not on the Order and their belief that the issuing court had erred." Reply Brief of Appellant/Cross-Respondent at 8-9. This is wrong. May's argument is not limited to whether the requisite finding appears on the face of the order. May points to the fact that there is no evidence –apart from the language that appears on the face of the order– that the threshold finding was ever made. *See* Petitioner's

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1 May's challenge to the validity of the order is not an impermissible collateral attack. The validity of a protection order, as opposed to its existence, is not an element of the crime of violation of such order, but rather is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function. State v. Miller, 156 Wash.2d 23, 31, 123 P.3d 827 (2005). "[V]alidity" includes whether the order was facially adequate and complied with the underlying statutes. Miller, 156 Wash.2d at 31, 123 P.3d 827.

May, 151 Wn.App. at 698, Note 8.

Supplemental Brief at 5-7; Petition for Review at 7-11; Amended Brief of Respondent/Cross-Appellant at 8-10, 17-18.

Second, the City claimed that May challenged the sufficiency of the evidence to support issuance of the order, as the defendant attempted to do in *State v. Joy, 128 Wn.App. 160, 114 P.3d 1228 (2005)*. Reply Brief of Appellant/Cross-Respondent at 10-11. This is also incorrect. "May did not ask the trial or appellate courts to look behind any findings actually made. Rather, he asserts only that the issuing court failed to make the finding required for issuance of the permanent order." Amended Brief of Respondent/Cross-Appellant at 14. *See also* Petition for Review at 11; Petitioner's Supplemental Brief at 5. This case is clearly distinguishable from *Joy*. *See* Amended Brief of Respondent/Cross-Appellant at 14.[2]

Finally, the City argued that *Miller* only permits challenges to the relevancy of the order. The City claimed this court intended "applicable" to mean "relevant" and used the terms interchangeably. Reply Brief of Appellant/Cross-Respondent at 12-15. Actually, *Miller* uses "applicable"

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[2]It was the City who interjected into this case some of the evidence submitted to the issuing court. CP 41-44; 150-205. The municipal court reviewed that information and opined that the superior court had not abused its discretion in issuing the permanent order. CP 42, 43. This is exactly the type of judicial second-guessing that *Miller* and *Joy* preclude. The question before this court is whether the threshold finding was ever made, not whether the evidence would or would not support that finding.

interchangeably with "valid." Miller, 156 Wn.2d at 24, 31-32. The City's attempt to limit the holding in *Miller* to questions of relevancy is not tenable. While *Miller* held the validity of the predicate protection order is not an element of the crime of violating that order, *Miller* held the validity or applicability of the order must be established, when challenged, before the order will be admitted. State v. Miller. 156 Wn.2d 23, 24, 123 P.3d 827 (2005), overruling State v. Edwards, infra, and State v. Marking, infra, insofar as inconsistent (but affirming the results).

> [T]he "validity" of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence.

Miller, 156 Wn.2d at 24. The court set out an illustrative list of challenges to the validity or applicability of the predicate order (as opposed to impermissible collateral attacks). The court included the type of challenge made here, "whether the order complied with the underlying statute." Miller, 156 Wn.2d at 31. "Collectively, we will refer to these issues as applying to the 'applicability' of the order to the crime charged." Id. The court ruled "invalid or deficient orders are properly excluded." Miller, 156 Wn.2d at 32.

These issues are not new. Challenges to the validity of the predicate

protection order have long been made in the criminal prosecutions for violation of those orders. City of Seattle v. Edwards, 87 Wn.App. 305, 308, 941 P.2d 697 (1997) (order vague as to expiration date or event); State v. Anaya, 95 Wn.App. 751, 976 P.2d 1251 (1999) (RCW 10.99 order issued at arraignment, but never recalled or expired, cannot serve as basis for criminal prosecution after dismissal of the case); State v. Marking, 100 Wn.App. 506, 512, 997 P.2d 461 (2000) (warning on order was insufficient rendering order invalid); State v. Sutherland, 114 Wn.App. 133, 135, 56 P.3d 613 (2002) (warning on order was sufficient); State v. Snapp, 119 Wn.App. 614, 624-25, 82 P.3d 252 (2004) (validity of no contact order must be proved when challenged). *Miller* does not preclude such challenges. Rather, *Miller* directs these questions to the trial court.

May's challenge to the applicability of the predicate protection order falls squarely within those authorized by *Miller*. It is not an impermissible collateral attack.

III *Miller* should not be limited or overruled. Challenges to the validity of the predicate protection order in a criminal prosecution are not impermissible collateral attacks.

The City argues "***any*** challenge to the order must be presented to the court that issued the order." Supplemental Brief of Respondent at 8

(emphasis added).[3] The City made this argument to the Court of Appeals as well. Reply Brief of Appellant/Cross-Respondent at 3-10. The City's intent is clear. The City argues *Miller* should be overruled in favor of prohibiting any challenges to the validity of the predicate protection order in a criminal prosecution.. *See* Supplemental Brief of Respondent at 12.[4] The State made this same argument to the court in *Miller*, citing the same case law presented by the City here. Compare Supplemental Brief of Respondent 7-12 with Appendix 1 (Supplemental Brief of Respondent, No. 76156-6, pages 8-15 available at the King County Law Library, King County Courthouse, Seattle, Washington). The State also urged the court to preclude challenges to the validity of the predicate protection order. "[I]t appears highly questionable given the collateral bar rule, that a defendant can claim as a defense that the order violated was erroneous." Appendix 1 at 14. This court declined the State's invitation in *Miller* and should maintain that precedent now.

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[3]The City would permit only those challenges permitted by the exceptions to the collateral bar rule.

[4]"Even if a permanent domestic violence protection order is required to recite the words of RCW 26.50.060(2) and even if the language of the order restraining defendant was not sufficient, defendant cannot challenge that omission in this criminal proceedings. Notwithstanding ***any invalidity*** of the order in this regard, defendant is nevertheless required to comply with it until the issuing court modifies or rescinds it." Id.

A. *Miller* provides a well-reasoned method for addressing invalid protection orders in criminal prosecutions.

The City presents no evidence or argument that *Miller* should be overruled or limited. The standard for overruling precedent is strict: the earlier decision must be both incorrect and harmful. Lunsford v. Saberhagen Holdings, Inc., 166 Wash.2d 264, 278, 208 P.3d 1092 (2009) "The doctrine of stare decisis provides this necessary clarity and stability in the law, gives litigants clear standards for determining their rights, and 'prevent[s] the law from becoming 'subject to incautious action or the whims of current holders of judicial office.' " State v. Stalker, 152 Wn.App. 805, 811, 219 P.3d 722 (2009), quoting Lunsford, 166 Wash.2d at 278. *Miller* is neither wrong, nor harmful. The challenges permitted in *Miller* are consistent with the case law leading up to that decision and with similar types of question raised in other prosecutions. As demonstrated below, permitting such challenges does not undermine the courts' ability to enforce domestic violence protection orders, nor diminish the protection provided by such orders.

B. The collateral bar rule from contempt cases does not apply here, is unnecessarily restrictive and fails to address this court's concern regarding inapplicable protection orders in criminal prosecutions.

In support of its position, the City relies upon three groups of cases.

The first group address the collateral bar rule: an order may not be collaterally attacked in contempt proceedings arising from its violation. State v. Noah, 103 Wn.App. 29, 46, 9 P.3d 858 (2000); State v. Breazeale, 144 Wn.2d 829, 841, 31 P.3d 1155 (2001); Mead School District No. 354 v. Mead Education Association, 85 Wn.2d 278, 284, 534 P.2d 561 (1975); United States v. United Mine Workers, 330 U.S. 258, 293, 67 S.Ct. 677, 91 L.Ed. 884 (1947); State v. Turner, 98 Wn.2d 731, 739, 658 P.2d 658 (1983). But even this hard and fast rule has exceptions. "While a court order that is merely erroneous must be obeyed, contempt will not be found if the court 'lacks jurisdiction of the parties or of the subject matter, or . . . lacks the inherent power to make or enter the particular order involved." Breazeale, 144 Wn.2d at 841, quoting Turner, 98 wn.2d at 739. Such an order is void and always subject to collateral attack. Id. As previously noted, this court considered this line of cases in *Miller*. Appendix 1.

Even if the collateral bar rule applied here, the fatal flaw in the underlying order falls within the exception. "A void judgment is one that 'exceed[s] . . . statutory authority' while an erroneous judgment is one that erroneous[ly] interpret[s] . . . the statute.'" Doe v. Fife Municipal Court, 74 Wn.App. 444, 450, 874 P.2d 182 (1994), *quoting* Marley v. Dept. of Labor

& Industries, 72 Wn.App. 326, 334, 864 P.2d 960 (1993). *See also* State v. Dolson, 138 Wn.2d 773, 777, 783, 982 P.2d 100 (1999) (Revocation of a driver's license that does not comply with due process is void and will not support a criminal prosecution).

Also, an order need not be entirely void. Doe, 74 Wn.App. at 451. One portion of an order of judgment can be considered void, if the court acted without authority as to that portion. Id. In *Doe*, the courts imposed costs as part of deferred prosecutions without any statutory authority. The court held, "[t]he deferred prosecution orders were valid except for the portion of the judgments imposing costs, which was void." Similarly here, the superior court exceeded its statutory authority by making the protection order permanent without the requisite threshold finding. The entire order is not void, but the portion extending the order for more than a year is void. Since May was accused of violating the order almost 10 years after it was entered, the order is not applicable in the criminal prosecution. Washington courts have declined to apply the collateral bar rule for similar reasons in prosecutions for violations of domestic violence protection orders. *See* State v. Karas, 108 Wn.App. 692, 697, 32 P.3d 1016 (2001) (due process challenge to RCW 26.50 protection order may be permitted under exception to

collateral bar rule for void orders or in the same manner challenges to unconstitutional convictions used to establish an element of an offense are allowed); City of Tacoma v. Cornell, 116 Wn.App. 165, 64 P.3d 674 (2003)(collateral bar rule does not apply where protection order was in effect at the time of the arrest but had been vacated before charges were filed).

Nonetheless, the contempt cases do not control here, nor are they instructive. May was not held in contempt for violation of the invalid protection order, he was prosecuted for a crime. While contempt can be subject a person to loss of liberty and financial penalty, it does not result in a criminal conviction. Contempt does not carry the direct or collateral consequences of a criminal conviction generally or the specific consequences of a domestic violence offense. A misdemeanor violation of a domestic violence protection order can enhance a future violation to a felony and cause the loss of the defendant's constitutional right to possess arms. RCW 26.50.110(5); RCW 9.41.800.

Also, the rationale underlying the collateral bar rule in contempt proceedings has no application here. The contempt power is exercised to vindicate the court's authority. Mead, 85 Wn.2d at 282. "Without such power, the court could ill exercise any other power, for it would then be

nothing more than a mere advisory body." Id. The City claims the courts' power to enforce domestic violence protection orders will be diminished if violators can challenge the validity or applicability of such orders in subsequent criminal prosecutions. But criminal prosecution is not the sole means of enforcing or deterring violations of domestic violence orders. Violators can also be held in contempt of court. RCW 26.50.110(3); SMC 12A.06.180(C). The punishment for contempt is the same as a gross misdemeanor. RCW 7.21.040(5). Contempt proceedings may be initiated by the prosecuting attorney on behalf of the protected party. SMC 12A.06.180(E); RCW 26.50.120; RCW 7.21.040. Unlike criminal prosecution, which can only punish past behavior, contempt can be used in both a coercive and punitive manner. RCW 7.21.010. In addition, domestic violence protection orders are subject to modification. If a defect is identified in a criminal prosecution, the protected party might petition the correct to correct the defect and clarify the court's intent. RCW 26.50.130.

Consequently, the *Miller* rule does not diminish the court's power to enforce domestic violence orders, or provide incentive to flaunt them. The approach affirmed in *Miller* is consistent with the nature of protection orders and the fundamental fairness required to maintain the integrity of and public

confidence in our criminal justice system. Domestic violence protection orders and prosecutions for violation of such orders are a modern invention adopted to prevent the cycle of domestic violence.[5] These written no contact orders are creatures of statute. Marking, 100 Wn.App. at 509-510 (validity of protection order turns on compliance with the statute); Edwards, 87 Wn.App. at 308 (authorizing statute, RCW 26.50.060(2), permitted permanent orders and orders for fixed terms); Anaya, 95 Wn.App. 751, 754-60, 976 P.2d 1251 (1999) (no statutory authority for protection order issued under RCW 10.99.040 to survive dismissal of the charges [now codified at RCW 10.99.040(3)]); State v. Schultz, 146 Wn.2d 540, 548 (2002) (where defendant is convicted, trial court may issue a new no-contact order or extend the one issued pretrial). The orders restrict respondents constitutional rights to intimate association and to parent. *See* State v. Ancira, 107 Wn.App. 650, 654, 27 P.3d 1246 (2001); City of Bremerton v. Widell, 146 Wn.2d 561, 576, 51 P.3d 733 (2002). Courts have no inherent power to issue such orders. Courts derive their authority to issue domestic violence protection orders from the governing statute. Domestic violence

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[4]The Domestic Violence Prevention Act was enacted in 1984 and made violation of such orders a misdemeanor. Laws of 1984, ch. 263, secs. 12, 24. The crime was then elevated to a felony for repeated violations or when the violation was accompanied by an assault. Laws of 1991, ch. 301, secs. 5 and 6 and Laws of 1996, ch. 248, secs. 7, 8, and 16.

protection orders serve not only to shield the protected party from the respondent, but also as the predicate for the crime of violating the order. The force of these orders flows from the statutes creating them. Therefore, an order which does not comply with the statute or exceeds the statutory authority is void, invalid and inapplicable to a criminal prosecution for violation of that order. Doe, 74 Wn.App. at 450-51; Miller, 156 Wn.2d at 31.

This is the same approach taken in driving while license suspended and felon in possession of firearm cases A license suspension that does not comply with due process will not support a criminal prosecution for driving in violation of the suspension. Dolson, 139 Wn.2d at 777, 783. Similarly, a constitutionally invalid felony conviction cannot serve as a predicate for unlawful possession of a firearm. State v. Summers, 120 Wn.2d 801, 810, 846 P.2d 490 (1993). A challenge to the underling conviction is not a collateral attack as there is no "attempt to invalidate the previous judgement . . . . Rather defendant seeks to foreclose the *prior* conviction's *present* use to establish an essential element of RCW 9.41.040, *i.e.,* a constitutionally valid conviction for a 'crime of violence.'" Id. at 810. While the validity of the predicate protection order is not an element of the offense, it is a predicate for the prosecution and must be proved when challenged.

C. The decisions from other jurisdictions do not support the City's position.

The second category of cases cited by the City are those from other jurisdictions. Supplemental Brief of Respondent at 11. Of these, the Vermont supreme court has adopted an approach similar to *Miller*. State v. Mott, 166 Vt. 188, 191-94, 692 A.2d 360 (1997). The court permitted Mott to raise a due process challenge to the domestic violence protection order issued in family court, in the same manner that such challenges are permitted in criminal prosecutions for driving while license suspended. Mott, 166 Vt. at 192 (permitting, but rejecting Mott's constitutional claims). The reasoning in *Mott* is consistent with this court's decisions in *Miller*, *Dolson*, and other Washington cases. *See* Karas, 108 Wn.App. at 697 (considering but rejecting constitutional challenge to RCW 26.50 protection orders in an appeal from burglary conviction predicated on such an order).

The cases from Alaska and Hawaii are also consistent with the Washington case law. In both cases, the defendant attempted to relitigate the factual basis for issuance of the protection order in the criminal prosecution, in the same manner rejected as an impermissible collateral attack in *State v. Joy, supra*. *See* State v. Jacko, 981 P.2d 1075 (Alaska Court of Appeals 1999); State v. Grindling, 96 Haw. 402, 405, 31 P.3d 915 (2001).

But *State v. Wright, 273 Conn. 418, 870 A.2d 1039 (2005),* conflicts with *Miller.* There the underlying pretrial domestic violence protection order was issued at arraignment, where defendant was not represented by counsel, to protect his girl-friend's sister whom he allegedly assaulted. He did not live with the sister; she merely stayed with them from time-to-time. He was then accused of violating the order and, at trial, attempted to introduce evidence that the court had no authority to issue the order as the sister did not qualify as a family or household member under the domestic violence prevention statute. Wright also asserted that the order was issued in violation of his right to counsel. Wright urged the court to permit the invalidity of the order as a defense, citing *State v. Marking, supra.* (*Miller* had not yet been decided.) The court instead chose a strict application of the collateral bar rule from its contempt cases. This court has already rejected that approach in favor of the rule in *Miller.*

The New Hampshire court's decision in *State v. Small, 150 N.H. 457, 843 A.2d 932 (2004)* is also not helpful. In that case, the court rejected as a collateral attack defendant's statutory argument that the TRO had expired at the time of the contacts charged as felony. stalking Also, the court noted that the order was not expired as Small had agreed to an extension. Small, 150

N.H. at 460.

Finally, the City's reliance on the federal firearms possession case is misplaced. U.S. v. Young, 458 F.3d 998 (9th Cir. 2006).[6] Young was convicted of being in possession of a firearm while subject to a Washington RCW 10.99 domestic violence restraining order. This crime requires the prosecution to establish as an element of the offense that the order was issued at a hearing of which Young had notice and an opportunity to participate. Young asserted the Washington proceeding did not afford him the type of hearing contemplated by Congress. (Young did not however, assert that the Washington hearing violated due process. Id. at 1008) The court acknowledged a split in the circuits on this point, but sided with those courts which held he government had proved its case as long as there was a hearing of which the accused had notice and opportunity to be heard. The court declined to greater substantive content on the term "hearing." Young, 458 F.3d at 1005-07. There was no indication that the protection order failed to comply with the governing statute or constitutional due process. Also, the crime of which Young was convicted required some process be provided before a restraining order can be the predicate for the crime. *Young* is

[5]This case was not included in the State's brief in *Miller*.

neither analogous nor persuasive here. The City's reliance on *Hicks* fails for the same reasons. U.S. v. Hicks, 389 F.3d 514, 535 (5th Cir. 2004) (a valid domestic violence protection order is not an element of the offense).

D. Decisions from other types of criminal prosecutions are not analogous or helpful to the instant question.

The third category of cases cited by the City proscribe collateral attacks on other legal processes upon which a crime is predicated. State av. Gonzales, 103 Wn.2d 564, 693 P.2d 119 (1985) (in escape prosecution, defendant cannot challenge the legality of the conviction for which he was confined); State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997) (lawful use of force does not excuse an assault on an officer executing an unlawful arrest unless the accused is at risk of serious injury); Bellevue v. Montgomery, 49 Wn.App. 479, 743 P.2d 1257 (1987) (In a prosecution for driving while is license is revoked as a Habitual Traffic Offender, accused cannot challenge the convictions upon which the revocation was based). The City makes no attempt to relate the particular holdings of these cases to the question before this court. These cases are not analogous to the case at bar and the rationale do not relate to the issues raised here. May's challenge to the invalid protection order in this case bears no resemblance to those situations.

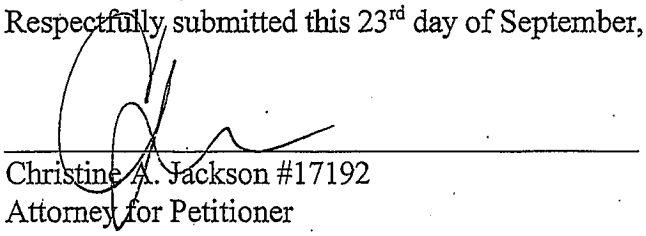
Gonzales makes a helpful observation, however. There the court

rejected the defendant's reliance on cases which require the government to prove a constitutional conviction to support a prosecution of unlawful possession of a weapon. Gonzales, 103 Wn.2d at 567. "The ability of the individual citizen to bear arms, although subject to reasonable regulation by the State is unquestionably a constitutionally protected right. The first degree escape statute, however, impinges upon no such constitutionally protected rights." Id. (internal citations and quotations omitted). Domestic violence protection orders also implicate respondents' important constitutional rights of intimate association, parenting noted above and liberty to move about. Spence v. Kaminski, 103 Wash.App. 325, 335, 12 P.3d 1030 (2000). Thus, these orders should be subject to the the scrutiny set forth in *Miller*.

IV CONCLUSION

The City appears to argue for a change in the law as stated in *Miller*, but provides no justification to restrict *Miller* in any way.

Respectfully submitted this 23rd day of September, 2010,



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APPENDIX 1

intended to include validity as an essential element of a violation of a no-contact order, it easily could have included that term in the statute. The plain language of the statute does not support the claim that validity is an element of the crime.

The State is unaware of any legislative history supporting the notion that validity is an element of the crime (and none has ever been cited by Miller or in any prior court decisions). To the contrary, the Legislature has clearly expressed its desire that the law provide maximum protection to victims of domestic violence.[5] It has recognized "the likelihood of repeated violence directed at those who have been victims of domestic violence in the past...." RCW 10.99.040(2)(a). It is highly unlikely that the Legislature intended that an individual, subject to a pre-trial no-contact order, could avoid criminal prosecution for willfully violating the order if he unilaterally, even if accurately, determined that the order was not valid for some reason. The proper method for challenging court orders is through the legal system, not by disregarding such orders. See, e.g., In re Marriage of Suggs, 152 Wn.2d 74, 93 P.3d 161

[5] The stated purpose of the domestic violence statutes is "to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the **maximum** protection from abuse which the law and those who enforce the law can provide." RCW 10.99.010 (emphasis added).

(2004) (appeal of antiharassment order); Hecker v. Cortinas, 110 Wn. App. 865, 867, 43 P.3d 50 (2002) (appeal of protection order). Given the policy concerns supporting the provisions for no-contact and protection orders, particularly when domestic violence is at issue, there is little basis for finding that the Legislature intended validity as an implicit element of the crime.

b. Under Washington Law, Validity Has Never Been An Element In Prosecutions For Violations Of Court Orders.

Not only did the Legislature not expressly include validity as an element of the crime of felony violation of a court order, but historically Washington courts have generally disapproved of a defense to such criminal prosecutions on the grounds that the underlying court order was invalid. When enacting RCW 26.50.110, the Legislature could not have assumed that Washington courts would presume that validity was an element of the crime.

While the criminal statutes at issue in this appeal are relatively new,[6] a criminal prosecution for a violation of a court order

[6] In 1984, as part of the Domestic Violence Prevention Act, the Legislature made it a misdemeanor to violate no-contact or protection orders. Laws of 1984, ch. 263, §§ 12, 24. The Legislature subsequently made it a felony for repeated violations of court orders or when the violation was accompanied by an assault. Laws of 1991, ch. 301, §§ 5 and 6 and Laws of 1996, ch. 248, §§ 7, 8, and 16.

is nothing new. It has long been a crime to willfully violate a court order. The crime is criminal contempt. See RCW 7.21.040; former RCW 9.21.020. The statute at issue in this appeal, RCW 26.50.110, recognizes that a violation of a no-contact or protection order also constitutes contempt. "A violation of an order under this chapter, chapter 10.99.... shall also constitute contempt of court, and is subject to the penalties prescribed by law." RCW 26.50.110(3).

This Court has long recognized that it is not a defense to criminal contempt that the court order violated was erroneous. See State v. Breazeale, 144 Wn.2d 829, 841, 31 P.3d 1155 (2001); State v. Lew, 25 Wn.2d 854, 870, 172 P.2d 289 (1946); State v. Noah, 103 Wn. App. 29, 46, 9 P.3d 858 (2000) (defendant charged with criminal contempt for violating an anti-harassment order may not challenge the underlying order). The "collateral bar rule" generally provides that "[a] court order which is merely erroneous must be obeyed despite the error and may not be collaterally attacked in a contempt proceeding." State v. Turner, 98 Wn.2d 731, 739, 658 P.2d 658 (1983). "The policy underlying the collateral bar rule is respect for independent judicial decision making." City of Bremerton v. Widell, 146 Wn.2d 561, 569, 51 P.3d

733 (2002). This rule also deters individuals from violating court orders they believe are invalid, encouraging them to instead challenge the orders through legal proceedings. "[F]laws which do not go to the heart of the judicial power are insufficient to justify the flaunting of an otherwise lawful order." Mead School Dist. No. 354 v. Mead Educ. Ass'n, 85 Wn.2d 278, 284, 534 P.2d 561 (1975). As the United States Supreme Court has explained:

> [W]e find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued.

United States v. United Mine Workers, 330 U.S. 258, 293, 67 S. Ct. 677, 91 L. Ed 884 (1947) (footnote omitted).[7]

The exception to this rule is if the underlying order is void. An underlying order is void if the court lacked jurisdiction or the inherent power to enter it. Breazeale, 144 Wn.2d at 841. Those challenges inevitably turn on questions of law for the court and are not elements of the crime. See, e.g., Turner, 98 Wn.2d at 738-39

[7] In a related vein, this Court has held that a defendant charged with escape may not challenge the legality of his confinement at the escape trial. State v. Gonzales, 103 Wn.2d 564, 567-68, 693 P.2d 119 (1985). And it is not a defense to a charge of assaulting a police officer that it was in response to an unlawful arrest. State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997).

(juvenile court had no jurisdiction over school truants and therefore no power to hold them in contempt of court's orders).

Courts in other jurisdictions, citing the collateral bar rule, have held that a defendant may not challenge the underlying validity of a court order in a prosecution for its violation. In State v. Wright, 870 A.2d 1039 (Conn. 2005), the Connecticut Supreme Court held that the "collateral bar rule" prevented a defendant from challenging the underlying factual basis for the protective order that he was charged with violating. The court noted that the relevant Connecticut statute "does not provide that the validity of the underlying order is a necessary element of that offense." 870 A.2d at 1043. The court observed that the collateral bar rule, applicable to contempt proceedings, applied with equal force here:

> [T]he collateral bar rule, is justified on the ground that it advances important societal interests in an orderly system of government, respect for the judicial process and the rule of law, and the preservation of civil order....
>
> Our endorsement of that rule in Cologne leads us to conclude that the defendant in the present case should not be allowed to challenge the validity of the protective order that he was charged with violating under § 53a-110b (a). That order was issued by a court of competent jurisdiction as a condition of the defendant's release in connection with the assault and disorderly conduct charges stemming from his altercation with Malcolm. Thus, the defendant had no

> privilege to violate that order. If the defendant believed that the order did not comport with the statutory requirements of § 46b-38c (e), he had two lawful remedies available to him. He could have: (1) sought to have the order modified or vacated by a judge of the Superior Court...or (2) appealed the terms of the order.... Having failed to pursue either remedy, the defendant may not seek to avoid his conviction for violating that order by challenging the factual basis of its issuance.

870 A.2d at 1043-44. See also United States v. Hicks, 389 F.3d 514, 534-36 (5th Cir. 2004) (holding that the defendant can not challenge the validity of the underlying protective order); State v. Small, 843 A.2d 932, 935 (N.H. 2004) (holding that the defendant may not collaterally attack validity of protective order in criminal proceeding); State v. Grindling, 31 P.3d 915, 918-19 (Haw. 2001) (same); Jacko v. State, 981 P.2d 1075, 1077-79 (Alaska Ct. App. 1999) (same); State v. Mott, 692 A.2d 360, 363 (Vt. 1997) ("We do not generally allow a person who is under a court order to challenge it by violating it").

Given the history of applying the collateral bar rule in Washington, there is no support in relevant caselaw for imposing validity as an implicit element of the crime of felony violation of a court order. Indeed, while the issue is not squarely presented here because Miller did not claim that the no-contact order in this case

was invalid, it appears highly questionable, given the collateral bar rule, that a defendant can claim as a defense that the order violated was erroneous.

c. The Validity Of The Underlying Court Order Is A Matter Of Law For The Court.

An obvious reason why the Legislature did not include validity as an element of the crime is because issues concerning the validity of an order normally turn on questions of law. And questions of law are for the court, not the jury, to resolve. RCW 10.46.070; see also State v. Young, 89 Wn.2d 613, 618, 574 P.2d 1171 (1978) (whether there is evidence legally sufficient to go to the jury is a question of law for the courts). Even if a defendant can raise invalidity of the order as a defense, it is not an element of the crime but a preliminary legal issue for the court to resolve.

In one of the few cases where this Court has addressed the issue of the validity of a court order, it recognized that the issue posed a question of law. In State v. Schultz, 146 Wn.2d 540, 48 P.3d 301 (2002), the defendant claimed on appeal that the no-contact order entered pretrial did not survive after he was sentenced on the matter. This Court observed that "[t[he validity of a pretrial no-contact order extended at sentencing is a question of

law regarding statutory meaning." 146 Wn.2d at 544. This Court reviewed the relevant statutes and caselaw and rejected the defendant's argument.

Similarly, in case after case before the Court of Appeals, the challenges to the underlying order have turned on questions of law. See e.g., State v. Snapp,119 Wn. App. 614, 625-26, 82 P.3d 252 (rejecting claim that the no-contact order was invalid because the trial court lacked authority to issue one in a driving while intoxicated case), rev. denied, 152 Wn.2d 1028 (2004); State v. Turner, 118 Wn. App. 135, 74 P.3d 1215 (2003) (rejecting claim that a restraining order was invalid because it did not contain certain language required for protection orders issued under a different statute), rev. denied, 151 Wn.2d 1015 (2004); State v. Karas, 108 Wn. App. 692, 32 P.3d 1016 (2001) (rejecting claim that the protection order was invalid because RCW Chapter 26.50 was unconstitutional).

In this case, the Court of Appeals held that the "validity of an order is ordinarily a legal question, to be decided by the trial court. If the state fails to persuade the court that a valid no-contact order exists, then the court should dismiss the charge. If the valid no-contact order is proven, then the implicit validity element is